



Signed: April 29, 2010

EDWARD D. JELLEN
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re
KONSTANTINOS ANASTASIOS DIMOYANNIS,
Debtor./

No. 09-43869 EDJ
Chapter 7

KONSTANTINOS ANASTASIOS DIMOYANNIS,
Plaintiff,
vs.

Adv. No. 09-04339 AJ

SALLIE MAE SERVICING,
Defendant./

DECISION: COMPLAINT TO DISCHARGE STUDENT LOAN OBLIGATION

Trial was held in the above-captioned adversary proceeding on March 3, 2010. Plaintiff Konstantinos Dimoyannis ("Dimoyannis") appeared on his own behalf. Miriam Hiser appeared on behalf of Educational Credit Management Corporation ("ECMC"), successor in interest to defendant Sallie Mae Servicing. By his complaint, Dimoyannis seeks to have certain student loan obligations discharged

Decision

1 through his chapter 7 bankruptcy case. The court, having considered
2 the evidence presented at trial, having reviewed the post-trial
3 briefs submitted by the parties, and for the reasons hereinafter
4 discussed, will enter its judgment against Dimoyannis and in favor
5 of ECMC.

6 I. Background

7 Dimoyannis is a 62 year old man with no dependants whose income
8 is comprised of a part time salary earned as a retail sales
9 associate and modest social security benefits. Dimoyannis earned
10 two degrees from San Francisco State University: a Bachelor's degree
11 in 1991, and a Master's of Economics degree 1996. He financed his
12 education through student loans funded by the Department of
13 Education; ECMC now holds Dimoyannis' consolidated note. The sum
14 presently owed to ECMC has grown to some \$107,000.

15 After earning his Master's degree, Dimoyannis was employed for
16 a period of approximately four years as an Economic Research Analyst
17 in the Division of Labor Statistics and Research of the Department
18 of Industrial Relations for the State of California. He was
19 terminated in 2002 for cause, and has since been unsuccessful in
20 obtaining employment that utilizes his Masters degree. Due to
21 chronic under-employment, Dimoyannis has been unable to repay his
22 student loan obligation.

23 In 2001, Dimoyannis filed a petition under chapter 13 of the
24 Bankruptcy Code. (Case no. 01-40233 RJN.) Dimoyannis performed
25 under a confirmed plan and received a discharge in 2004. No
26 payments were made on the student loan obligation during that time.

1 On May 7, 2009, Dimoyannis filed a petition in bankruptcy under
2 chapter 7 of the code. This adversary proceeding followed.

3 II. Discussion

4 Bankruptcy Code § 523(a)(8) provides that qualified education
5 loans are excepted from a debtor's discharge, unless such exception
6 would impose an undue hardship on the debtor and the debtor's
7 dependants. 11 U.S.C. §523(a)(8)¹. The Ninth Circuit has adopted a
8 three-part test laid out by the Second Circuit in In re Brunner that
9 the debtor must satisfy in order to demonstrate undue hardship
10 within the meaning of § 523(a)(8). See United Student Aid Funds,
11 Inc. v. Pena, 155 F.3d 1108, 1112 (9th Cir. 1998) (adopting the
12 Second Circuit test laid out in Brunner v. New York State Higher
13 Educ. Svcs., 46 B.R. 752, 758 (D.C.N.Y. 1985), *aff'd* 831 F.2d
14 395,396 (2nd Cir. 1987)). The Brunner test requires that the debtor
15 establish three elements: 1) that she cannot maintain, based on
16 current income and expenses, a minimal standard of living for
17 herself and her dependants, 2) that additional circumstances exist
18 indicating that this state of affairs is likely to persist for a
19 significant portion of the repayment period, and 3) that the debtor
20 has made good faith efforts to repay the loans. See Brunner, 831
21 F.2d at 396.

22 To determine whether Dimoyannis is capable of maintaining a
23 minimal standard of living, the court must examine his finances.

25 ¹ Unless otherwise indicated, all future section references
26 are to 11 U.S.C. §101, et seq.

1 See Education Credit Management Corporation v. Howe, 319 B.R. 886,
2 890 (9th Cir. BAP 2005). The burden of proving the three Brunner
3 elements and therefore demonstrating undue hardship is on the
4 debtor. See Rifino v. United States, et al., 245 F.3d 1083, 1087-88
5 (9th Cir. 2001).

6 At trial, Dimoyannis testified that although he has made a
7 diligent effort to obtain employment in his field, he has been
8 unsuccessful due to the prior "for cause" termination by the State
9 of California. Dimoyannis testified that the termination
10 effectively barred him from finding work with the State of
11 California or its municipalities. He has also been unable to find
12 work in the private sector that utilizes his degree. Dimoyannis is
13 currently employed part-time as a sales associate at a Sears
14 department store.

15 Dimoyannis testified that his gross annual income from
16 part-time employment is approximately \$14,000. Although Dimoyannis
17 did not directly testify as to his net monthly income, the court can
18 surmise that it is something less than \$1,167². Dimoyannis also
19 introduced evidence that, as of January 2010, he receives \$696 per
20 month in social security benefits, bringing his total net monthly
21

22 ² \$14,000 divided by twelve is \$1,166.66. According to IRS
23 form 1040 (available at <http://www.irs.gov/pub/irs-pdf/f1040.pdf>)
24 the 2009 standard deduction for a single taxpayer was \$5,700 and
25 the personal exemption amount was \$3,650. See 26 U.S.C. §§ 63,
26 151. This suggests that \$9,350 of Dimoyannis' income is earned
tax-free, and the remaining \$4,650 is subject to income taxation.

1 income to roughly \$1,800. He testified that his monthly expenses
2 include \$900 in rent, \$150 in utilities, \$25 for an internet
3 connection, and \$150 for food. This leaves Dimoyannis with a
4 monthly surplus of over \$500.

5 The court is sympathetic to the fact that Dimoyannis lives very
6 frugally in order to remain within his means. He testified that he
7 does not smoke or drink, does not own a functioning automobile, and
8 has delayed certain medical treatment because he does not have
9 health insurance or the funds to pay for such treatment out of
10 pocket. Although Dimoyannis is certainly living modestly, he does
11 appear to be capable of living, on a month by month basis, on the
12 income he earns through working and via social security benefits.
13 The Ninth Circuit BAP, in In re Howe, stated that, "a minimal
14 standard of living under § 523(a)(8) does not equate to a middle
15 class standard of living." In re Howe, 319 B.R. at 889.

16 In addition, ECMC has agreed to discharge a portion of the
17 amount owed on the loan pursuant to its authority under the Code of
18 Federal Regulations³. According to its post-trial brief, ECMC has
19 unilaterally reduced Dimoyannis' outstanding debt of \$107,858.13,
20 bearing interest at 7.75%, to \$20,160 at 0% interest. See Post-
21 Trial Brief of Defendant, doc. #15, at 3.

22
23 ³ 34 C.F.R. § 682.402(i)(v) provides that a guaranty agency
24 opposing a petition for an undue hardship discharge may agree to
25 discharge a portion of the amount owed on a loan if it reasonably
26 determines that the agreement is necessary in order to obtain a
judgment on the remainder of the loan.

1 Finally, ECMC introduced evidence regarding the Department of
2 Education's Income Based Repayment plan ("IBR"), which operates to
3 limit the amount that an obligor is required to pay based on the
4 obligor's income and family size. At trial, ECMC introduced
5 evidence that no payment is required until debtor's taxable income
6 reaches \$15,000 per month (see ECMC exhibits D and G), suggesting
7 that under Dimoyannis' present circumstances the IBR plan would
8 require payments of \$0. Should Dimoyannis' income increase, modest
9 payments would be required under the IBR plan.⁴

10 The court finds that Dimoyannis is capable of maintaining a
11 minimal standard of living if required to repay his student loan
12 obligation. The court bases this finding on the evidence indicating
13 that, at his current income level, Dimoyannis would be required to
14 make payments under the IBR plan ranging from \$0 to \$47, and
15 Dimoyannis' testimony suggesting his monthly surplus exceeds those
16 amounts. The court therefore holds that Dimoyannis fails the first
17 prong of the Brunner test, and is ineligible for an undue hardship
18 discharge of his student loan obligation.

19 Because the court finds that Dimoyannis is capable of
20 maintaining a minimal standard of living if his student loan debt is
21 not discharged, the second and third prongs of the Brunner test are
22 moot. See In re Howe, 319 B.R. at 889 ("The second and third prongs
23 of the undue hardship test presuppose that a debtor has satisfied

24
25 ⁴ Note that until total income exceeds \$25,000, social
26 security income is not considered taxable income and is therefore
not included in the IBR calculation. See 26 U.S.C. § 86.

1 the first prong"). However, even if this court were to conclude
2 that Dimoyannis satisfied the first two Brunner elements, his
3 failure to renegotiate his debt through the Department of
4 Education's IBR program would weigh against a finding that he has
5 made a good faith effort to repay the debt.

6 The Ninth Circuit BAP has held that good faith is measured by
7 the debtor's efforts to negotiate a repayment plan. See
8 Pennsylvania Higher Education Assistance Agency v. Birrane 287 B.R.
9 490, 500 (9th Cir. BAP 2002). In Birrane, the BAP found that the
10 debtor failed the good faith prong of the Brunner test because she
11 failed to discuss repayment options similar to IBR⁵, even though the
12 debtor in that case was unaware of such programs prior to trial. In
13 this case, Dimoyannis testified that he is fully aware of the
14 repayment options available to him through the IBR program, but he
15 declined to pursue them due to feared negative tax consequences.
16 Under these circumstances, the court cannot make a finding that
17 Dimoyannis has made a good faith effort to repay his student loan
18 obligation.

19 III. Conclusion

20 For the foregoing reasons, the court holds that Dimoyannis is
21 not entitled to an undue hardship discharge of his student loan
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23 ⁵ At the time of the Birrane decision, the income-based
24 repayment plan offered by the Department of Education was called
25 the Income Contingent Repayment Plan, which, like IBR, tied loan
26 repayments to the debtor's annually adjusted income. See Birrane
at 494-95.

1 obligations under Bankruptcy Code §512(a)(8). The court will issue
2 its judgment in favor of ECMC.

3 **END OF DECISION**
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Decision

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